EDITORS’ INTRODUCTION

This issue begins with an interesting article by Marcus Smith QC, a Chairman of the Competition Appeal Tribunal (CAT), who examines the standards of review and appeal in cases before the CAT. The author considers, first, the approach taken by the Court of Appeal to reviewing judicial decisions before describing the standards of review that are applied to administrative decisions. The standard of review has been a matter of considerable importance to litigants, the public authorities whose decisions are challenged and, of course, to the tribunal itself. Based on the CAT’s experience to date, the author compares the ‘judicial review’ and ‘on the merits’ standards that have been interpreted and applied in cases involving various matters of competition law and sector-specific regulation.

Professor Stefan Enchelmaier has written on a very different, but equally interesting, topic of how economic and non-economic considerations are treated under Art 101 of the Treaty on the Functioning of the European Union (TFEU) with particular reference to the relationship between competition law and the free movement provisions. The judgments of the Court of Justice in Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervending)¹ and Meca-Medina and Majcen v Commission² have been the subject of much controversy and commentary in recent years. Professor Enchelmaier concludes that non-economic grounds of justification may be invoked in favour of agreements which do not have as their object the restrictions of competition, but produce anti-competitive effects while seeking to realise a general, public interest.

In April 2012 the Department for Business Innovation and Skills published a consultation document setting out options for reform of the law on private actions in competition law.³ The government considers that a greater role for private actions would complement public enforcement, by helping to increase deterrence, so bringing benefits for the economy, consumers and businesses. Many of the proposed reforms are intended to make the UK CAT a ‘major’ venue for all types of private actions. It is therefore timely that three essays on various aspects of private enforcement should be published in the Competition Law Journal.

Belinda Hollway, Nicholas Frey and Jennifer Reeves have written about the implications of, and unanswered questions arising from, the rulings of the Court of Justice in Pfleiderer AG v Bundeskartellamt⁴ and of the High Court in National Grid Electricity Transmission plc v ABB Ltd.⁵ Both cases involved the important question of whether, and to what extent, should

¹ (Case C-309/99) [2002] ECR I-1577.
² (Case C-519/04 P) [2006] ECR I-6991.
³ Available at www.bis.gov.uk.
⁴ (Case C-360/09) [2011] All ER (EC) 979.
⁵ [2012] EWHC 869 (Ch), [2012] All ER (D) 92 (Apr).
documents and information submitted as part of an application for leniency/immunity be disclosed to a claimant in an action for damages. In Pfleiderer the Court of Justice held that the national courts must determine the question of disclosure on a case-by-case basis. Having surveyed the cases post-Pfleiderer, however, the authors conclude that there is a clear need for European and/or national authorities to enact legislation protecting leniency materials.

The second in the trio of articles related to private enforcement is by Dr Peter Whelan who has examined the case for enacting legislation to recognise a so-called passing-on defence, which is concerned with the quantification of loss caused by an infringement of competition law. The author considers the ‘defence’ in the light of the government’s twin objectives for its consultation on improving private enforcement, namely, promoting economic growth and securing fairness, as well as its effects on private enforcement more generally.

Marie Leppard’s article reverts to a theme of previous issues of the Journal during this calendar year, namely the reform of the institutional framework in the UK. The author compares and contrasts the structure, powers, goals and operation of the UK public authorities with those of their counterparts in France. The author points out various ways in which the UK and France can learn from one another and hopes that there will be a gradual process of convergence around best practices to secure the efficiency and effectiveness of competition law enforcement.

Anna Pisarkiewicz presents a useful summary of the European Commission’s (the Commission) most recent Art 102 TFEU infringement decision in Telekomunikacja. The decision represents the latest in series of interventions by the Commission to ensure a competitive, high-speed Internet access market. In each case the Commission has been keen to ensure that an incumbent monopolist is not allowed to eliminate, deter, or marginalise new entrants to the market. The author discusses, in particular, whether the Commission’s decision has modified the analytical framework for analysing constructive, as opposed to outright, refusals to deal.

The issue concludes with our regular Economic Focus which provides the third contribution on private enforcement. James Kavanagh, Gunnar Niels and Robin Noble, all of Oxera, discuss, in particular, one of the most important, and potentially controversial, proposed presumptions in damages actions against companies that have participated in cartels. The suggested presumption is that each member of the cartel successfully and unlawfully increased its prices by (at least) 20%. The authors review the government’s justification for introducing such a presumption and, based on a review of the empirical studies and their own experience of providing expert evidence in damages actions, question the need for it. They are confident that judges will be able to calculate damages ‘by the exercise of a sound imagination and the practice of the broad axe’.

David Bailey, Christopher Brown and Sarah Long

---


7 Devenish Nutrition Ltd v Sanofi-Aventis S.A (France) [2007] EWHC 2394 (Ch), [2008] 2 WLR 637, at para [29].